IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1902.

THE SAINT LOUIS HAY AND GRAIN COMPANY, *Appellant*, v. THE UNITED STATES. } No. 305.

## *BRIEF FOR APPELLANT.*

## I. STATEMENT OF THE CASE.

### The Claim.

This is a claim for a balance claimed to be due on a large quantity of hay sold and delivered by the claimant company to the United States. The case is reported below, 37 C. Cls. 281.

The findings of fact, made by the Court of Claims (record, pp. 4–13), may be summarized as follows:

### Advertisement for Hay.

On the 25th of June, 1898, at the height of military operations during the war with Spain, Colonel J. G. C. Lee, Assistant Quartermaster-General, United States Army, Chief Quartermaster First Army Corps, published, at Camp George H. Thomas, Georgia, an advertisement, calling for proposals to be received up to July 11 following, for supplying nine million pounds of baled hay, besides a large quantity of oats, bran, and straw, to be delivered free on board cars, at Battlefield Railroad Station, Georgia. (Record, p. 4.)

Certain information was furnished in connection with the advertisement, among which are the following paragraphs:

"2. The foregoing are the estimated quantities which will be required, but bids will be accepted in whole or in part and awards made accordingly, and awards made under accepted bids will provide that the quantities awarded may be increased or decreased at the option of the United States, not exceeding 20 per centum thereof, should the interest of the public service demand such change; that in case of change of the quantities required by increase or decrease, notice of such change will be served on the bidder by the chief quartermaster; and, further, that if the troops shall be wholly or in part withdrawn, the awards shall become inoperative to the extent of such reduction.

"4. Deliveries of the supplies to begin within five days from date of award, and proceed at daily rates of at least one-sixtieth of amounts, or in such quantities and at such times afterwards, as may be designated by the chief quartermaster or his authorized representative, free on board cars at Battlefield R. R. Station, Ga.

"9. In case of failure of the bidder to furnish and deliver the supplies awarded to him, the said bidder shall be charged with all expense resulting from such failure." (Record, p. 5.)

## Proposal.

A number of bidders submitted proposals. The claimant in this case, a corporation having its principal office at St. Louis, Missouri, submitted a written proposal to furnish nine million pounds of hay, at sixty-one and a half cents per hundred pounds.

The proposals were opened at the office of the depot quartermaster, Chickamauga Park, Georgia, in the presence of Col. J. G. C. Lee and a large number of bidders.

Col. Lee stated on that occasion that the party that received this contract would have to be prepared to have

the goods ready and ship immediately, as they had a very large number of animals, and that the required amount as stated in the proposal would be used up each day, and that the hay must be of the quality stated in the proposal (p. 6).

**Acceptance.**

July 12, 1898, Col. Lee accepted the claimant's proposal in writing, stating that deliveries were to be made as prescribed in the circular advertising for proposals, and informing the claimant that the hay would be inspected, received, and paid for by Captain D. E. McCarthy, Assistant Quartermaster, U. S. Army, the depot quartermaster at Battlefield R. R. Station, Ga., to whom all consignments were to be made. Col. Lee also verbally referred the president of the claimant company to the depot quartermaster, Captain McCarthy, for directions as to the exact amount that would be wanted daily (pp. 6, 7).

Thereupon the president of the company called on said Captain McCarthy, who gave him verbal orders to have not less than 8 nor more than 10 cars on the track daily.

The minimum carload of hay was of 20,000 pounds weight, and thus eight carloads would have amounted to 160,000 pounds.

There were about 12,000 animals at Chickamauga Park at the time. (Finding II, Record, p. 7.)

**Deliveries during Summer of 1898.**

Immediately upon the acceptance of the claimant's proposal its officers arranged by telegraph with their correspondents that the hay would be shipped from points in the immediate vicinity of its production, mostly in the States of Indiana and Illinois, direct to Chickamauga Park. (Finding III, p. 7.)

By shipping in this manner the claimant could purchase more economically than in the St. Louis market,

and was also enabled to obviate much of the expense incident to handling and switching the cars which would be incurred at St. Louis, and to save in transportation, which cost less from these points than from St. Louis.

Shipments were made in this way until by the 27th of August, 1898, hay had been delivered by the claimant and accepted by the United States, to the amount of 4,685,949 pounds, or more than half the amount provided in the advertisement, proposal, and acceptance.

On the 28th of August, Captain McCarthy telegraphed the claimant, "Do not ship any more hay until notified to do so" (p. 7).

At that date the claimant had one hundred or more cars in transit to Chickamauga Park, which it was obliged to dispose of in different markets throughout the country for what price it could get. This hay had cost the claimant various prices, from $6 to $7.50 a ton, being from 30 cents to 37½ cents a hundredweight. The cost of the shipment of the same from the points of its production would not have exceeded 25 cents a hundredweight.

The claimant was ready and willing to proceed with shipments at a rate practically identical with that at which it had been delivering, in which event it would have completed the delivery of the entire 9,000,000 pounds by the close of September, 1898, and at the price named in its proposal would have sustained no loss.

Upon the receipt of the telegram of August 28, 1898, the claimant, by one of its officers, both verbally and in writing, protested against the stoppage of shipments. The quartermaster, however, would not at that time accept any more hay. (Finding III, p. 8.)

## Deliveries, September, 1898, to June, 1899.

On the 12th of September, 1898, the depot quartermaster, at Chickamauga Park, telegraphed to the claim-

ant, at St. Louis, "Send twelve car loads of hay at once." From this date to the 13th of June, 1899, there were a number of calls by the depot quartermaster upon the claimant for hay. The telegrams ordering the hay (p. 8) and the replies of the claimant thereto are contained in Finding IV, pp. 8–10.

Every order was complied with until, between the 12th of September, 1898, and the 13th of June, 1899, 3,814,490 pounds were delivered, making, together with the 4,685,949 pounds delivered prior to August 28, 1898, a total of 8,500,439 pounds, delivered by the claimant and accepted by the officers of the United States.

**Increased Cost of Hay.**

Owing to the manner in which the orders were given and the season of the year, the claimant was unable to buy at points near the places of production, as it had done during the summer of 1898, and ship thence to Chickamauga Park, Georgia, but had to purchase the hay on the St. Louis market at the current market price in that city, and ship the same from St. Louis to Chickamauga Park, Georgia, and also had to pay the full rate of transportation between these points, twenty-nine (29) cents a hundredweight, besides charges for rehandling and switching. Hay is an article varying greatly in price at different seasons of the year, and gets much higher as the autumn and winter go on, and reaches its maximum about the close of the spring months (p. 11).

Between the 28th of August, 1898, when shipments were stopped by the telegram hereinbefore quoted, and the month of June, 1899, when the last of the hay was delivered, hay rose in price from $7.50 a ton to $11.50 a ton, delivered free on board the track at St. Louis. In this way the hay delivered after the 12th of September, 1898, cost the claimant an amount considerably in excess

of what it would have cost them in the summer, and in excess of the price of 61½ cents a hundredweight,—the rate at which they have been paid for the same (p. 11).

### Payments Held Back.

Payments were always held back from the claimant by the quartermaster and an amount due to claimant was always in the hands of the quartermaster as security to compel it to deliver as required (p. 11).

### Protest.

The claimant before proceeding to deliver hay pursuant to the telegrams from the depot quartermaster hereinbefore set forth, beginning on the 12th of September, 1898, informed him that increased cost would be thrown upon the claimant if compelled to deliver, and requested to be relieved from so doing; but the depot quartermaster refused to release the claimant from the obligation of delivery. The claimant while objecting did not notify the depot quartermaster that it would demand damages for the losses sustained, or would seek to recover a higher price for hay to be delivered than that expressed in its proposals to deliver hay set forth in finding I (p. 11).

### Payment, How Made.

Full payment was made by the defendants according to the terms of the aforesaid agreement and was accepted by the claimant without protest or reservation at the time when the vouchers were given or the payments made. (Finding IV, p. 11.)

### Last Payment July 24, 1899.

The last payment was received by the claimant from the United States July 24, 1899. (Finding V, p. 12.)

**Claim, May 11, 1899. — Report and Action.**

On the 11th of May, 1899, a letter was written to Captain McCarthy, the depot quartermaster, making claim against the Government for loss sustained, in which it was stated that the writer, the president of the company, had had a personal interview with Col. C. P. Miller, of the Quartermaster-General's Office, at Washington, who had advised him to file their claim through him—the depot quartermaster.

The depot quartermaster reported thereon, under date of June 28, 1899, as follows:

"It would seem but just that this firm's claim should be approved, after it has been clearly shown that the amount of their claim is based on an increased cost of hay to them."

And again, at a later date, as follows:

"Undoubtedly deliveries were made for a longer period than contemplated when bids were made by contractors.

"At that time there were about 12,000 animals at the camp at Chickamauga Park, but in August and September the camp was practically broken up.

"The contractors continued to supply us with hay until July, '99, and in the meantime, especially during the winter months, hay had advanced in price, so that it seems but just that some recompensation should be made to the contractors."

The claim, however, was not allowed on the ground that it was one for unliquidated damages, of which the accounting officers have no jurisdiction. (Finding VI, rec. pp. 12, 13.)

**Difference Between Cost and Amount Received.**

The cost to the claimant of the hay delivered after the 12th of September, 1898, exceeded the price it received for the same by $7,869.

The cost of the 4,685,949 pounds of hay delivered by the claimant under the agreement aforesaid prior to September 12, 1898, including the cost of transportation of the same, was $27,211.53. The difference between this cost and the amount received by the claimant for said hay is $1,607.37. (Finding V, p. 12.)

### Opinion of Court of Claims.

The Court of Claims, in its opinion, delivered by Chief Justice Nott (rec. pp. 13–16), held as follows (p. 15):

1. "That the agreement not being in writing and signed by the parties, as required by the Revised Statutes, section 3744, was not a valid contract upon which an action can be brought for damages caused by the defendant's breach."

2. "As to the right of the claimant to recover, irrespective of the express contract, what the hay was actually worth at the time and place of delivery, the court is again constrained to hold that the claimant can not recover."

3. "That in cases of implied contract where the recovery will be *in quantum meruit* and the price to be paid is undetermined by agreement, where the defendant has paid and the contractor has accepted a price as payment in full, it closes the transaction, and the contractor can not come in and be allowed to allege that his goods were worth more than the price which he consented to take for them."

### Judgment and Appeal.

Judgment was entered dismissing the petition (p. 16).

From this judgment the claimant appealed (p. 16).

## II. ASSIGNMENT OF ERRORS.

The appellant hereby assigns the following errors in the opinion and judgment of the Court of Claims:

1. That said court held that the claimant was not en-

titled to recover the actual value of the hay at the time and place of its delivery, less the amount already received for the same; whereas, said court should have held that the claimant was entitled to recover the actual value of the goods sold and delivered, less the amount already paid to and received by it.

2. That said court erred in dismissing the petition of the claimant.

## III. BRIEF OF ARGUMENT.

### Government Contracts—R. S. §§ 3709, 3744.

The Revised Statutes contain the following provisions relative to government contracts:

"SEC. 3709. All purchases and contracts for supplies or services, in any of the Departments of the Government, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public exigencies do not require the immediate delivery of the articles, or performance of the service. When immediate delivery or performance is required by the public exigency, the articles or service required may be procured by open purchase or contract, at the places and in the manner in which such articles are usually bought and sold, or such services engaged, between individuals."

"SEC. 3744. It shall be the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior, to cause and require every contract made by them severally on behalf of the Government, or by their officers under them appointed to make such contracts, to be reduced to writing, and signed by the contracting parties with their names at the end thereof; a copy of which shall be filed by the officer making and signing the contract in the Returns Office of the Department of the Interior, as soon after the contract is made as possible, and within thirty days, together with all bids, offers, and proposals to him made by persons to ob-

tain the same, and with a copy of any advertisement he may have published inviting bids, offers, or proposals for the same. All the copies and papers in relation to each contract shall be attached together by a ribbon and seal, and marked by numbers in regular order, according to the number of papers composing the whole return."

## No Formal Contract.

The provisions of the former of these sections were strictly complied with. There was a public advertisement, there were proposals by the claimant and other bidders, and there was a written acceptance of the claimant's proposal. Here the proceedings stopped. No formal contract, as required by section 3744, was signed. What was the effect of the failure to sign such a contract upon the rights of the parties?

As held by the Court of Claims, no binding contract between the parties was created by the advertisement, the proposal, and the acceptance. The transaction was not consummated, because it was not reduced to writing and signed by the contracting parties with their names at the end thereof, as required by section 3744.

## Decisions on Failure to Sign Contract.

In the case of *Clark* v. *United States* (95 U. S. 539), this court considered the act, originally passed in 1862, now forming, in substance, section 3744 of the Revised Statutes and held as follows (p. 542):

"Perhaps the primary object of the statute was to impose a restraint upon the officers themselves, and prevent them from making reckless engagements for the government; but the considerations referred to make it manifest that there is no class of cases in which a statute for preventing frauds and perjuries is more needed than in this. And we think that the statute in question was intended to operate as such. It makes it unlawful for

contracting officers to make contracts in any other way than by writing signed by the parties. This is equivalent to prohibiting any other mode of making contracts. Every man is supposed to know the law. A party who makes a contract with an officer without having it reduced to writing is knowingly accessory to a violation of duty on his part. Such a party aids in the violation of the law. We are of opinion, therefore, that the contract itself is affected, and must conform to the requirements of the statute until it passes from the observation and control of the party who enters into it. After that, if the officer fails to follow the further directions of the act with regard to affixing his affidavit and returning a copy of the contract to the proper office, the party is not responsible for this neglect."

And in the subsequent case of *South Boston Iron Company* v. *United States* (118 U. S. 37), where there was a written proposal, addressed to the Secretary of the Navy, and a written acceptance thereof by the Secretary, this court held (p. 42):

"An effort has been made in this case to show a contract in writing, but we agree entirely with the Court of of Claims that the papers relied on for that purpose are nothing more in law or in fact than the preliminary memoranda made by the parties for use in preparing a contract for execution in the form required by law. This was never done, and, therefore, the United States never became bound. Within a very few days after the memoranda were made the whole matter was abandoned by the Department, and the Iron Company has neither performed any of the work which was referred to, nor has it ever been called on to do so."

**Legal Status of Accepted Proposal.**

It must be admitted, therefore, that the Court of Claims was right in holding that, notwithstanding the duty of preparing the contract for execution was that of the Secretary of War, and, although that duty was neglected

by his department, the government is not liable upon the advertisement, proposal, and acceptance as upon an executory contract. If the case ended with these papers there would be no claim. If the department had repudiated the transaction and had notified the claimant that no hay would be required under its proposal and the acceptance thereof by the Chief Quartermaster of the First Army Corps, the claimant could not recover, even for its expenses in preparing to carry out the contract. (*Monroe* v. *United States*, 184 U. S. 524.)

But the case does not end there. The claimant delivered hay whenever it was called upon to do so and, by the 27th of August, 1898, had delivered more than half of the 9,000,000 pounds called for by the advertisement. All this hay has been paid for at the rate named in the proposal and acceptance. If deliveries had continued "at daily rates of at least one-sixtieth of amounts," as provided in paragraph 4 of the circular of advertisement (p. 5), the court finds that "at the price named in its proposal it would have sustained no loss" (p. 8).

The whole claim arises out of deliveries of hay made between the 12th of September, 1898, and the 13th of June, 1899. This period includes each of the four seasons and amounts to three-quarters of the entire year. During this time the depot quartermaster called upon the claimant to furnish hay in varying quantities at irregular intervals. Every order received prompt attention. It was filled with the utmost promptness consistent with the season of the year and the state of the market.

The case depends upon the two following conditions of fact and law:

1. An advertisement, proposal, and acceptance calling for hay in certain quantities to be delivered within a particular time and to be paid for at a specified price. This

transaction never reached the form of a complete valid contract and is, by the decisions of this court, null and void.

2. A subsequent delivery of hay by the claimant to the United States, accepted by its officers for public use. For the first part of this hay the claimant has received an amount only slightly above its cost and not more than its market value. For the latter part the claimant has received an amount not only less than its market value but less than what it actually cost the claimant. The reason for the great difference between the actual cost of the hay to the claimant and the price it has received from the government lies in the fact that "hay is an article varying greatly in price at different seasons of the year, and gets much higher as the autumn and winter go on, and reaches its maximum about the close of the spring months." (Finding IV, p. 11.)

**An Implied Contract for Reasonable Value.**

What are the rights and liabilities of the parties arising from the delivery of hay by the claimant and its acceptance by the officers of the United States without any valid written contract, but under circumstances showing a benefit to the government in obtaining needed food supplies for the animals of the army? This question is answered by the same case of *Clark* v. *United States* (95 U. S. 539), previously quoted. After showing in the passage before quoted that a contract not signed with the formalities required by law is void, the opinion goes on (p. 542):

"We do not mean to say that, where a parol contract has been wholly or partially executed and performed on one side, the party performing will not be entitled to recover the fair value of his property or services. On the contrary, we think that he will be entitled to recover

such value as upon an implied contract for a *quantum meruit*. In the present case, the implied contract is such as arises upon a simple bailment for hire; and the obligations of the parties are those which are incidental to such a bailment. The special contract being void, the claimant is thrown back upon the rights which result from the implied contract."

And, after discussing the special circumstances of the case, the conclusion is reached (p. 543):

"Of course, the claimant is entitled to the value of the use of his vessel during the time it was in the hands of the government agents, which, as shown by the findings, was the period of eight days. This value, in the absence of any other evidence on the subject, may be fairly assumed at what was stipulated for in the parol contract. Though not binding or conclusive, it may be regarded as admissible evidence for that purpose. Neither party thought fit to adduce any other. The cases bearing on this subject are collected in Browne's Treatise on the Statute of Frauds, sects. 117–130; but they mostly refer to the question whether the contract, though void by the Statute of Frauds, can be regarded as conclusive evidence of the *quantum meruit*. Whether or not it is admissible as some evidence, though not conclusive on either party, is apparently not much discussed; though it seems to us that it may fairly be deduced from the tenor of the cases that the evidence is admissible. At all events, that is our view. As a declaration of the parties, it is entitled to some credence."

According to this view the claimant is entitled to recover the value of the hay at the time and place of delivery. If there were no other finding on the subject, the rate stated in the proposal and acceptance might be presumed to be the actual value and the claimant could recover no more. But the findings show that after the proposal and acceptance were signed the value of hay rose very greatly. It "gets much higher as the autumn

and winter go on and reaches its maximum about the close of the spring months" (p. 11). These seasons coincided with the calls of the Quartermaster's Department for delivery of hay. A considerable part of that called for subsequent to the resumption of shipments on the 12th of September, 1898, was called for during the autumn. In December there were no calls or deliveries, and in January only a small one late in the month. By far the greatest part of the hay delivered after the resumption was in February, March, April, and May, 1899. This is precisely the time of the year at which hay attains its maximum value. It is for this reason that the claimant sustained such a great loss by having to deliver, in the late winter and the spring, hay which it had been led to expect would be required in the late summer and early autumn.

If the price of hay had fallen in the market instead of rising, the claimant, having no valid executory contract, could not recover the price named in its accepted proposal, but would be limited to the market value of the article at the time of delivery. It is equally entitled to demand that market price when it happens to be greater than that named in its accepted proposal.

**Special Contract Void for All Purposes.**

The effect of the decision of the Court of Claims is to treat the special contract as void in its restriction of the time of deliveries to "proceed at daily rates of at least one-sixtieth of amounts" (p. 5), but to give it effect as limiting the price to be paid for the goods, even though delivered afterwards. But the contract can not be void for one purpose and valid for another. In the *Clark case*, hereinbefore quoted, it is held, as to a void contract introduced as evidence of the *quantum meruit*, "As a declaration of the parties, it is entitled to some credence" (95

U. S. 543). In this case sufficient weight is accorded to the proposal and acceptance, void as a contract, by treating it as a declaration of the parties as to the market value of hay at the time the proposal and acceptance were signed. Beyond that it is of no force. As to future deliveries, it neither binds the government to pay that price nor limits the claimant to the recovery of that price.

In *Filor* v. *United States* (9 Wall. 45, 48), this court said of an agreement between a citizen and an army officer, void for want of proper approval but under which property was delivered, "The agreement or lease was, so far as the government is concerned, the work of strangers. The obligation of the government for the use of the property is exactly what it would have been if the possession had been taken and held without the existence of the agreement."

The view that a special contract can not be set up for one purpose while treated as a nullity for another, is well illustrated by the case of *Williams* v. *Bemis*, 108 Mass. 91. There the plaintiff by a verbal agreement was to cultivate the defendant's land for two years for a share of the crop,—both parties understanding that the crop would be larger in the second year than in the first. This contract was void by the statute of frauds. At the end of the first year the defendant paid the plaintiff his share of that year's crop, but refused to let him cultivate for the second year. It was held that the plaintiff might maintain an action for work done and materials furnished in cultivating the land. It was said in the course of the opinion (pp. 92, 93):

"'The true principle is this: the contract being void and incapable of enforcement in a court of law,' (the defendant having refused to perform it), 'the party paying the money, or rendering the services in pursuance thereof, may treat it as a nullity, and recover the money or value of the services under the common counts.'

*King* v. *Brown*, 2 Hill, 485, 487, per Nelson, C. J. In *Gray* v. *Hill*, Ry. and Mood. 420, Best, C. J., held that where the defendant, in consideration of certain repairs to be made by the plaintiff, agreed to assign a lease to him, and after the repairs were made refused to make the assignment, and set up the statute of frauds as a defense, the law implied a promise to pay for the repairs, and this implied promise was 'not touched by the statute.' See also *Van Deusen* v. *Blum*, 18 Pick. 229.

"The defendant insists that the work was done by the plaintiff in the cultivation of crops which were to be partly his own, and was not done upon the credit of Towne, or with any expectation of charging it against him. Such undoubtedly was the understanding of the parties originally. But as Towne saw fit to say that the special contract was not binding upon him, it can not be set up by his executor as binding upon the plaintiff. *King* v. *Welcome*, 5 Gray, 41. It can not be treated as a nullity for one purpose, and as a contract for another."

The subsequent remarks of the court still further demonstrate the inconsistency between the repudiation of the contract by the defendant and his then insisting upon the payment for the first year's work as a payment under the contract. It was held, on the contrary, that the whole transaction, in the absence of a valid express contract, must be treated as the usual contract implied by the law from rendition of services, or delivery of goods at the request of another,—that is to pay what the services, or goods, were reasonably worth.

### Defense of Accord and Satisfaction.

The Court of Claims says (rec. p. 15), "It must be acknowledged that this case belongs to that class which has been termed by many courts 'hard cases,'" etc. Were it not for the defense of accord and satisfaction, set up by the government, the decision below would probably have been favorable to the claimant. The ruling of the learned

court below on this point is contained in the following paragraph from its opinion (rec. p. 15):

"As to the right of the claimant to recover, irrespective of the express contract, what the hay was actually worth at the time and place of delivery, the court is again constrained to hold that the claimant can not recover. It is true that, under the authority cited, a party whose contract is for this statutory reason invalid and void may recover in *quantum meruit;* and it is true that, where there is an express valid contract, payment by a debtor of a part of his debt is not satisfaction of the whole, even though a receipt in full be given. (*United States* v. *Bostwick*, 94 U. S. R. 53.) But nevertheless it has been uniformly held by this court since *Kirkham & Brown*, (4 C. Cls. R. 223) that in cases of implied contract where the recovery will be in *quantum meruit* and the price to be paid is undetermined by agreement, where the defendant has paid and the contractor has accepted a price as payment in full, it closes the transaction, and the contractor can not come in and be allowed to allege that his goods were worth more than the price which he consented to take for them. (*Comstock's case*, 9 C. Cls. R. 141.) Acceptance of a smaller sum than the one claimed does not leave the defendants open to further claim, if the acceptance of the smaller sum was voluntary, without intimidation, and with full knowledge of all the circumstances. (*Savage* v. *United States*, 92 U. S. R. 382.)"

## Material Facts Grouped.

This decision is evidently based upon the facts contained in the last two sentences of Finding IV (foot of p. 11), reading as follows (we number them for greater clearness of presentation as distinct paragraphs):

1. "The claimant while objecting did not notify the depot quartermaster that it would demand damages for the losses sustained, or would seek to recover a higher price for hay to be delivered than that expressed in its proposals to deliver hay set forth in Finding I.

2. "Full payment was made by the defendants accord-

ing to the terms of the aforesaid agreement and was accepted by the claimant without protest or reservation at the time when the vouchers were given or the payments made."

But these findings must be read in connection with others which we quote (paragraphing and numbering them in like manner):

3. "Upon the receipt of the telegram of August 28, 1898, the claimant, by one of its officers, both verbally and in writing, protested against the stoppage of shipments." (Finding III, p. 8.)

4. "The claimant before proceeding to deliver hay pursuant to the telegrams from the depot quartermaster hereinbefore set forth, beginning on the 12th of September, 1898, informed him that increased cost would be thrown upon the claimant if compelled to deliver, and requested to be relieved from so doing; but the depot quartermaster refused to release the claimant from the obligation of delivery" (p. 11).

5. "Payments were always held back from the claimant by the quartermaster and an amount due to claimant was always in the hands of the quartermaster as security to compel it to deliver as required" (p. 11).

6. "The claim was submitted to the quartermaster general, under date of May 11, 1899." (Finding VI, p. 12.)

7. "And the depot quartermaster reported thereon, under date of June 28, 1899, as follows:

"It would seem but just that this firm's claim should be approved, after it has been clearly shown that the amount of their claim is based on an increased cost of hay to them.'"

8. "And again, at a later date, as follows:

"'Undoubtedly deliveries were made for a longer period than contemplated when bids were made by contractors'" (top of p. 13).

9. "The claim, however, was not allowed on the ground that it was one for unliquidated damages, of which the accounting officers have no jurisdiction." (Finding VI, p. 13.)

10. "The last payment was received by the claimant from the United States, July 24, 1899." (End of Finding V, p. 12.)

## No Accord and Satisfaction.

When these statements are compared with one another by dates it clearly appears that there is no room for the operation of a defense of accord and satisfaction. The claimant, at the earliest moment at which it could be in any way damnified by the action of the officers of the Government—August 28, 1898—protested against the stoppage of shipments. When, on the 12th of September, there was a resumption of orders, the claimant notified the depot quartermaster that increased cost would be thrown upon it if compelled to deliver. This was a sufficient notification that it would expect payment of the increased cost by the Government. Business men are not to be held to the technical accuracy of a special pleader. It is enough that they in good faith keep those with whom they are dealing informed of their position. The "full payment" "accepted by the claimant without protest or reservation," found by the court (par. 2, *ante*, pp. 18, 19), must be read in the light of the previous protests of August 28 and September 12. Moreover, this finding is materially qualified, if not overthrown, by the particulars also found by the court. In truth, the claimant at no time received or accepted payment in full for all goods delivered to the date of payment. The quartermaster not only held back payments but held them, as expressly found, for the purpose of compelling the claimant to deliver as required. True, the claimant having on June 13, 1899, made its last delivery, did, on July 24, 1899, receive the last payment from the United States. But a month before the last delivery was made and two months and a half before the date of the last

payment, the claimant, May 11, 1899, submitted its claim through the depot quartermaster to the Quartermaster-General. The letter making the claim states that the writer had had a personal interview with Col. C. P. Miller of the Quartermaster-General's office, at Washington, who had notified the company to file its claim. In this letter the claimant company placed itself upon record as claiming reimbursement for its increased expenses (record, p. 12).

The depot quartermaster reported in favor of the approval of the claim, provided it were shown that it was based on increased cost of hay (record, foot p. 12). At a later date, probably in response to a call by his official superiors for a further report, he admitted that "undoubtedly deliveries were made for a longer period than contemplated when bids were made by contractors" (top p. 13). And the disallowance of the claim was based only on the ground that the accounting officers had no jurisdiction to allow a claim for unliquidated damages (last sentence of finding, p. 13). This is in accordance with the uniform current of decision. (5 Decisions Comp. Treas. 770, where numerous authorities are cited.)

It was under these conditions that the final payment was made on the 24th of July, 1899. This was the first date upon which any payment, which, upon any theory, was a full payment, was ever made.

The authorities concur in holding that to sustain the defense of accord and satisfaction there must be both an accord and a satisfaction; that is, that there must be an agreement—express or implied—to receive a certain sum in satisfaction of a claim, coupled with payment of that sum. Thus, in *City of Memphis* v. *Brown* (20 Wall. 289), it is said (p. 309): "In 1 Smith's Leading Cases it is said: 'The accord must be executed, and a mere executory agreement can never be pleaded as an accord and satisfaction.'

Again: 'If part of the consideration agreed on be not paid the whole accord fails.'" The authority referred to by the court, *Cumber* v. *Wane* (1 Smith's Leading Cases, 7 Amer. ed. 595, with notes, pp. 604–611), states the rule very fully. To the same effect is *Flockton* v. *Hall*, 14 Q. B. (Adolphus & Ellis, N. S.) 380; *Hall* v. *Flockton*, 16 Q. B. (Adolphus & Ellis, N. S.) 1039.

Such a defense can not be sustained in this case. Even if the deliveries at the demand of the government, coupled with part payment, be regarded as an accord, they were not accompanied by satisfaction. If the full payment, at what may be called the contract rate, on July 24, 1899, might, under different circumstances, operate as a satisfaction, there was no accord, for at that date the claimant was actively engaged in pressing a claim for reimbursement of the cost of its goods, and the refusal to allow that claim was not based upon a denial of its merits but upon a want of jurisdiction to allow it. On neither side was there any understanding that either the partial payments made during the deliveries or the final payment of July 24, 1899, were to close the transaction. The account was an open one throughout. It remains to-day an unsettled claim, free for examination on its merits.

## Court of Claims Authorities Examined.

The paragraph of the opinion of the Court of Claims (rec. p. 15), hereinbefore quoted (*ante*, p. 18) as containing the gist of the decision that the action of the claimant in accepting payment constitutes an accord and satisfaction, barring them from making any further claim, contains a citation of four authorities, two in this court and two in the Court of Claims. These we now briefly examine.

In *United States* v. *Bostwick* (94 U. S. 53), cited by the Court of Claims (rec. p. 15), it was held that an agreement

by the government to pay rent at the rate of $500 a month was not satisfied by the payment of $250 a month, even though the receipts were signed, "in full of the above account" (94 U. S. top of p. 56). On this the court said (p. 67): "Payment by a debtor of a part of his debt is not a satisfaction of the whole, except it be made and accepted upon some new consideration. It is not found that there was any new consideration in this case. All that appears is, that an account was made out for the rent from July 1 to September 30, at the new rate, and that this account was receipted by Mr. Lovett after payment."

In response to this principle the court cites its own decision in the case of *Kirkham* v. *United States* (4 C. Cls. 223). But there it was said (p. 226): "This amount is paid by the United States and received by the claimants, and who at the time signed a receipt and acquittance in full of the vouchers. There is no evidence that there was any duress, or undue influence brought to bear on these claimants to compel or induce them to sign these receipts; nor that they protested or even objected at the time to the deductions then made."

How different from this case, where the record bristles with protests and objections, where there never was even a partial settlement to date, and where the final payment was made in the face of a claim for a larger amount recommended by the local quartermaster as just, and not denied by the department at Washington, but dismissed solely for want of jurisdiction.

*Comstock* v. *United States* (9 C. Cls. 141) goes somewhat further than the *Kirkham case*. In a learned opinion by the same distinguished judge, who, nearly thirty years later, delivered the opinion in this case, it is held (par. 2 of syllabus, p. 142):

"Where property is taken for the public use by impressment, so that there is no express contract or stipu-

lated consideration, and payment therefor is made at a less price than the owner demands, which payment is intended by the officers of the Government as payment in full, and is accepted by the owner without objection, protest, or reservation, though no receipt in full is given by him, he is concluded from seeking the balance of his demand."

Again, how different from the present case. No payment was ever made, even on pretense of being in full, until the 24th of July, 1899, when a final payment was made at the price named in the proposal, but, in the face of repeated objections and protests and of a formal claim by the contractors, and with a concession of the quartermaster that the claim was just, and a ruling of the accounting officers that they had no jurisdiction to consider on its merits a claim for any more.

Finally the court cites *Savage* v. *United States* (92 U. S. 382). Here the holder of Treasury notes, redeemable on presentation, surrendered them and received paper currency. Claiming that they should have been paid in gold, he afterwards brought suit for the difference in value. It was held that, as the surrender of the notes was a prerequisite to receiving anything in exchange for them, the acceptance of currency was inconsistent with a subsequent claim for gold. Nothing in this case in any manner touches the present claim.

## Authorities Quoted in Response.

This case is governed by the principles asserted in the decision in *Piatt's Administrator* v. *United States* (22 Wall. 496). There a contractor had a contract in writing with the United States; but that contract was varied by a parol agreement with the Secretary of War for a larger amount. Congress passed a private act for his relief, limiting the amount allowable to the amount of a counterclaim which

the government asserted against him. The case having been adjusted on this basis, his administrators brought an action against the government for the balance remaining due on the verbal contract. It was held that he was neither limited to the prices named in the written contract nor concluded by the settlement made under the act of Congress. This court allowed him the full value of all the supplies furnished, in accordance with the oral agreement with the Secretary of War.

The case is much better and more fully reported in 10 C. Cls. 163, than in Wallace. The concluding portion of the opinion (22 Wall. 509, 510) is fairly summarized in paragraph 4 of the syllabus, 10 C. Cls. 164:

"Where a party voluntarily accepts the amount awarded him by a commission possessed of no judicial power, it is just to conclude that he acquiesces in the decision of the special tribunal which rejects a part of his claim as well as in the finding in his favor. But where the accounting officers of the Treasury are forbidden by law to allow a contractor anything beyond the amount of a crossclaim of the Government against him, manifestly he has no option."

The quartermaster, in the present case, never did pay the claimant in full, but constantly held back payments (p. 11, about two-thirds down the page). And though the claimant did receive a "last payment" July 24, 1899 (end of Finding V, p. 12), it was while a claim was pending for the reimbursement now claimed in this suit. The accounting officers held that they were without jurisdiction to allow this balance, being, as they held, for unliquidated damages (end of Finding VI, p. 13). Their decision not being on the merits and a simple denial of the claim for want of jurisdiction, there is no ground for holding it to be in the nature of an accord and satisfaction.

In *Fire Insurance Association* v. *Wickham* (141 U. S. 564),

it is held, in accordance with the decision in *Baird* v. *United States* (96 U. S. 430, 431): "In such cases the question is, whether the payment was in fact made and accepted in satisfaction." (141 U. S. 577.)

In *Chicago and Northwestern Railway Company* v. *United States*, and *Chicago, Milwaukee, and St. Paul Railway Company* v. *United States* (104 U. S. 680, 687), railroad companies performed services for the government in the transportation of mails. They had a contract fixing certain rates for that transportation, but these rates were reduced by statute, of which a notice was given them by the Postmaster-General. In one of the cases the claimants continued, after the statute and notice, to render the service and received the reduced compensation without protest. The Court of Claims, under these circumstances, held, *Chicago, Milwaukee and St. Paul Railway Company* (14 C. Cls. 125, 144):

"The statutory directions to the Postmaster-General were also a notice to the claimants that the service would be discontinued under the old rates, and would be continued, if at all, under the new rates. After this notice the claimants were at liberty to stop carrying the mails; in which case the defendants would have been obliged either to continue to pay the old rates or to terminate the contract and pay the month's extra pay. The claimants, however, made no objection to the notice contained in the statute; and, so far as appears in this case, continued to render the service under the new law without dissent or protest. We must presume that they acquiesced in its provisions and accepted the change which it made in their contract."

In the other case a protest was made but it was held to be unavailing, *Chicago and Northwestern Railway Company* v. *United States* (15 C. Cls. 232, 245).

This court, however, reversed the judgments in both cases. It held (104 U. S. 686), "the performance by the

company of the service required by its contract, notwithstanding the notice of the intended reduction of the compensation by the Postmaster-General, can not be construed as a waiver of its rights or an acquiescence in new proposals; and that whether it had protested against the erroneous construction of the law or not."

And again (p. 687), "here the service was to be performed, at all events, just as it was performed, but under which of two claims was in dispute. Its performance was a condition of both, and can not, therefore, be a bar to either."

Still more in point is the case of *Swift Company* v. *United States* (105 U. S. 691; 111 U. S. 22). This was a case of purchases of internal revenue stamps and the litigation arose out of a difference of opinion between the purchaser of the stamps and the Internal Revenue Office as to the mode of calculating the commissions. Among other defenses it was insisted that there had been an acquiescence of the claimant as well as of all similar dealers. But it was held by this court that where the business was conducted upon the footing of a running account the claimant could not be barred of his statutory rights by anything short of an actual settlement upon some other basis. The following remarks of the opinion when the case first came before this court are largely applicable to the transactions involved in the present claim (105 U. S. 695, 696):

"The case made by the petition is not that of successive and independent purchases of stamps, settled for, at the time, when the commissions given by the law were paid by the commissioner, the purchaser voluntarily accepting payment, not in money, but in other stamps; and new dealings, of the same character, but separate as to each instance, had, afterwards, upon the same footing and by mutual understanding. On the contrary, the business was conducted upon the footing of a running account.

Money was paid on account of stamps furnished or to be furnished, in sums, differing in amount, but not less in any case than $500; and stamps were supplied in varying quantities, as ordered, without reference to corresponding and equivalent payments of cash; a bond with satisfactory security in pursuance of law, having been given and accepted, to secure the government against loss, in consequence of purchases on credit. The dealing is, undoubtedly, evidence that the appellant was willing to purchase stamps, to be paid for by a credit on account, in lieu of cash for commissions; but it does not prove that he was willing to waive his right to a commission upon the stamps so purchased. And it would be incumbent on the government, in order to deprive him of his statutory right, not only to show facts, from which an agreement to do so might be inferred, but an actual settlement based upon such an understanding."

And in the subsequent decision (111 U. S. 22), it was held that the claimant was not barred of its rights, although the remittances made to it by the Internal Revenue Office were based upon a statement of account made out according to the theory of the Treasury Department, which statement the claimant received and under which he accepted payment without formal protest.

The decision in that case goes much further than is required to warrant a decision in favor of the claimant in the present case, where there were protests throughout the entire transaction against the basis upon which the Government was dealing with the claimant company. When the claimant was called upon, especially in time of war, to furnish goods to an authorized officer of the United States for the actual use of troops in the field, it would have incurred, at least, serious moral responsibility if it had failed to comply with the demand. The conduct of the officers of the claimant company, in supplying the goods whenever called for, was creditable to them as citizens and deprived them of none of their legal rights.

In the case of *Cape Ann Granite Co.* v. *United States* (20 C. Cls. 1) the Court of Claims took occasion to define the legal effect of a receipt in full accompanied or preceded by a protest. It said, in language fully applicable to the facts of this case (pp. 14, 15):

"A receipt in full is not binding as such simply because it recites that it is in full. It is open to contradiction according to the fact. It has no force as a contract, and is inoperative to bind the parties, unless it is based upon an agreement, compromise, or settlement with a complete understanding. At the time the receipt was given the protest was accepted by the agent of the Government without objection, the president of the company asserting, beyond the protest, that there were other claims, to wit, as to measurement, which were not included in the receipt. Neither party to the transaction of giving and accepting the receipt understood it as a settlement of differences as to measurement. The protest was afterwards changed by the claimant, by the consent of the defendants, so as to preserve the identity between the receipt and protest. We do not regard the fact that the receipt was sent by one officer of the Government and delivered by another as sufficient to change the law applicable to such transactions.

"Construing the receipt and protest as one transaction in fact and in law, and finding no evidence that any settlement took place between the parties, we must hold that the receipt is inoperative as an estoppel against the right of the claimant to have its claim examined in this court."

**The Gibbons, Salomon, and Clark Cases.**

In the court below the case of *Gibbons* v. *United States* (8 Wall. 269) was earnestly pressed by the learned Assistant Attorney-General upon the attention of the court. There there was a valid, express contract for oats. After the time for delivery under that contract had expired the quartermaster in charge demanded a delivery, and, by pressure amounting to threats, enforced the demand.

The price of oats had risen by this time and it cost the claimant more to get the oats than he received for them. It was held that there was only one contract and that the attempt to hold the government for a higher price as under an implied contract was inconsistent with the express one.

The view that the government was liable as upon an implied contract for the reasonable value of the goods furnished was treated by this court at that time as an attempt to hold the government liable for a tort.

This view of the effect of the delivery of goods to an authorized officer of the government originated with the opinion of this court in that case. No trace of it appears in the opinion of the Court of Claims in the same case (2 C. Cls. 421), or in the argument for the United States as reported either in the Court of Claims or in this court. It also ended with that case. Five years later, the same learned justice—Miller—who delivered the opinion in the *Gibbons case* delivered the opinion in *Salomon* v. *United States* (19 Wall. 17), and held that a delivery made under analogous circumstances might be treated in the alternative, as either an extension of the term of the original contract or a new transaction, and that, in either event, the obligation of the government was to pay the value. The entire opinion as reported, 19 Wall. 19, 20, is as follows:

"Whether we regard the delivery made in October as made under a verbal extension of the time stipulated in the original contract, or consider it as a new transaction in which the government received and took possession of the corn, and used part of it and permitted the remainder to be injured in its hands, we think the claimant is equally entitled to be paid for it.

"The act of 1862, requiring contracts for military supplies to be in writing, is not infringed by the proper officer having charge of such matter, accepting delivery of such

supplies after the day stipulated, nor is a verbal agreement to extend the time of performance invalid.

"And if this were not so, when the quartermaster in charge receives of a person corn for the government, gives a receipt and voucher for the amount and the price, and the government uses such part of it as it wants and suffers the remainder to decay by exposure and neglect, there is an implied contract to pay the value of such corn, which value may, in the absence of other testimony, be presumed to be the price fixed in the voucher by the quartermaster."

Moreover, the *Gibbons case* was decided at a very early period, while the principles of the liability of the government were, as yet, quite unsettled. The opinion refers (8 Wall. 275) to "the absence of adjudged cases determining how far the government may be responsible on an implied assumpsit for acts which, though unauthorized, may have been done in its interest, and of which it may have received the benefit."

Nine years later this court, in *Clark* v. *United States* (95 U. S. 539), decided that question, which was previously in doubt, and held the United States liable under an implied contract, where it had received a benefit from a transaction, even though in its origin unauthorized. Here again it may be noted that the learned author of the earlier opinion, Mr. Justice Miller, vigorously dissented (p. 544).

While, however, later decisions have qualified, if they have not overruled, *Gibbons* v. *United States*, it is to be noted that that case and this differ in one point which essentially distinguishes them. That is, that in the *Gibbons case* there was an express and valid contract for the delivery of the grain. That being the only contract in existence, the court held that all deliveries, even though at a date subsequent to the limit named in that contract, must be referred to it. In this case there was no valid

express contract. The claimant's right to anything rests upon an implied contract, which can only be for the reasonable value of the goods delivered. Hence the *Gibbons case* is not an authority for limiting the claimant to the value named in the original proposal and acceptance.

## Time is of the Essence.

There is a special reason in the present case for giving the transaction of the parties, whether regarded in the light of an implied or of an express contract, a construction which will not limit the price of the hay to that named in the proposal and acceptance. The advertisement clearly contemplated an early delivery, and the depot quartermaster, who may be supposed to have had as thorough means of knowledge as any one, admits this to have been its true meaning. "Undoubtedly deliveries were made for a longer period than contemplated when bids were made by contractors" (p. 13). Hay is an article varying greatly in price at different seasons of the year.

In *Hipwell* v. *Knight* (1 Younge & Collyer, Eq. Exch. 401, 416), Baron Alderson, after a general statement as to the cases in which time is or is not of the essence of the contract, concludes:

"If, therefore, the thing sold be of greater or less value, according to the effluxion of time, it is manifest that time is of the essence of the contract, and a stipulation as to time must then be literally complied with in equity as well as in law. The cases of the sale of stock and of a reversion, are instances of this."

Accordingly, it was held (citing the case just quoted) by the Supreme Court of Illinois, that—

"It is true that, in general, time is not, unless so declared by the parties, of the essence of the contract; but

the rule has exceptions, as, if the thing sold be of greater or less value, according to the effluxion of time, it is manifest that time is of the essence of the contract." *Wilson* v. *Roots*, 119 Ill. 379, 392.

The specific case of hay came before the Supreme Court of Michigan (Cooley, J. being one of the members of the court), in *Coon* v. *Spaulding*, 47 Mich. 163. Here the contract sued on was dated September 25, 1879, and provided for delivery of hay "in a reasonable time after being pressed." The plaintiffs did not call for hay until November 22, 1879, when defendant refused to let them have it. Held that the delay was unreasonable and the contract could not be enforced.

See also *Cameron* v. *Wells*, 30 Vermont, 633; *Blydenburg* v. *Welsh*, Baldwin, 331, 338; s. c. 3 Federal Cases, No. 1583; *Carter* v. *Phillips*, 144 Mass. 100; s. c. 10 Northeastern Reporter, 500.

### Construction Consistent With Good Faith.

In the case of a government contract there is a special ground for insisting upon a construction which is in accordance with good faith and which seeks no unconscionable advantage of the other party.

In *Scott* v. *United States* (12 Wall. 443), it was said (p. 445), "If a contract be unreasonable and unconscionable, but not void for fraud, a court of law will give to the party who sues for its breach damages, not according to its letter, but only such as he is equitably entitled to."

This principle was applied in *Hume* v. *United States*, (132 U. S. 406) to a contract to sell to the government a quantity of shucks at a price far beyond their real value. It was there said (p. 415): "The claimant by his replication insists that the price of sixty cents per pound for shucks 'was the price at which he intended to bid, and

that there was no mistake on his part in making out the bid.' This is an admission, when taken with the findings of fact, that he designed to commit the agents of the government to a contract 'such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other,' and is fatal to his recovery according to the letter of the contract."

Is not the same principle applicable where the Government seeks to take advantage of an unconscionable bargain with the citizen? And if one construction of a contract or transaction would render it reasonable, honest, and fair, and another would make it unreasonable, unfair, and oppressive, is it not the duty of the court to adopt the former and discard the latter? If the spirit of the decision in *Hume* v. *United States* is applied to this case the result can hardly be doubtful. The conclusion will be the same as that reached by the quartermaster, that "it would seem but just that this firm's claim should be approved," etc. The advertisement, proposal, and acceptance contemplated a speedy delivery, and that speedy delivery not having been required, and the government having ordered hay at a later date, it would be unconscionable to require the claimant to continue to furnish it after hay had risen to rates far beyond those which prevailed at the time the parties originally negotiated.

If hay had fallen in the market to the same extent that it in fact rose, could the claimant recover in the Court of Claims the contract price for these later deliveries? The decisions of this court in the *Scott* and *Hume* cases answer this question in the negative and would limit a recovery to the market value. Similarly is the claimant entitled to the market value when the price has risen instead of falling. There can not be one rule for the government and another for the citizen. *United States* v. *State Bank* (96 U. S. 30, 36).

**Measure of Damages.**

The hay delivered prior to September 12, 1898, cost the claimant $27,211.53. The difference between this cost and the amount received by the claimant for that hay is $1,607.37. This sum represents the excess of the amount received over the cost. On the other hand, the cost to the claimant of the hay delivered after the 12th of September, 1898, exceeded the price it received for the same by seven thousand eight hundred and sixty-nine dollars ($7,869). (Finding V, p. 12.)

We contend that the recovery should be for the entire excess of the cost of the hay delivered after September 12 over the price already received for the same, that is, for $7,869. On the other hand, counsel for the United States contended in the court below, and doubtless will here, that, in case of a recovery, there should be a deduction of the $1,607.37 on the hay first delivered. This contention would be well founded if the record showed in express terms or by any fair implication that the $1,607.37 was an excess over the real market value of the hay to the government at the time and place of its delivery. No such finding, however, is made. On the contrary, the implication is very strong that the price which the government has already paid for the hay first delivered is no more than its fair market value.

The record does not show exactly how many bids there were in answer to the advertisement of June 25, 1898. It only shows that "a number of bidders submitted proposals" (top of p. 6) and that the proposals were opened on the 11th of July following, in the presence of "a large number of bidders." The claimant was the successful bidder. It appears that at the time of the acceptance of the proposal the price named by the claimant was the lowest the government could get on a competition of bidders. This affords good evidence that it was the low-

est market price at that time. If there were any evidence to show that it was more than a fair market price at that time and for the period afterwards to the 28th of August, within which the government continued to call for hay, the government was entitled to show that fact and, on showing it, would be entitled to recover back any excess of payments over the market value.

The advertisement, proposal and acceptance did not reach the stage of a completed contract and the claimant during that period was entitled just the same as during the subsequent period to the market value of its goods, and it was entitled to nothing more. The price it was entitled to receive can be neither increased nor diminished by the void transaction which did not become a contract. But the government has shown no diminished value below the price it has actually paid. The $1,607.37 profit represents the *quantum meruit* of the personal services of the claimant.

There is no reason why the Government, in paying for the hay on a *quantum valebat* basis, should not pay for the services of these professional handlers of hay, who knew where to get the hay in the country; who collected it and delivered it to the United States authorities. If claimant had not done this, the Government would have been obliged to send men about the country to buy up hay,—men without the special knowledge of the officers of the claimant company,—and would probably have paid a higher rate for such service.

The Court of Claims, in *Monroe* v. *United States* (35 C. Cls. 199; affirmed, 184 U. S. 524), says (p. 207):

"In the contemplation of all parties who enter into express agreements it is supposed and understood that a reasonable profit shall be made by him who performs. It is a matter of judgment what a reasonable profit is, and there have been numerous cases before the court showing that from 10 to 25 per cent is regarded, prospectively, as

the range of profits which contractors hope or expect to make."

And in *Murphy* v. *United States* (13 C. Cls. 372) that court said (p. 380):

"The claimant is entitled to recover only the actual cost of the extra work and labor, with a reasonable commission for his trouble in superintending it. In the absence of evidence, we fix 10 per cent as such reasonable commission."

The excess received by claimant over the cost to it of the hay furnished up to August 27, 1898, which probably represents little more than actual expense of handling the goods, was $1,607.37 on goods which cost the claimant $27,211.53. This is about six (6) per cent on the cost of the goods, or hardly more than half the minimum declared in the *Monroe* and *Murphy* cases to constitute a fair profit. Further comment is unnecessary to demonstrate the inequitableness of requiring the claimant to set off this meager profit made on about half the transaction, against the actual cost of the other half of the goods, thus requiring the claimant to do business at actual cost, and depriving it of a profit which on the entire transaction would only amount to about three (3) per cent of the cost of the goods.

## Conclusion.

For these reasons it is asked that the judgment of the Court of Claims be reversed and the case remanded to that court with directions to enter a judgment for the claimant for seven thousand eight hundred and sixty-nine dollars ($7,869.00).

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